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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 702

OSCAR L. CHAPMAN, SECRETARY OF THE INTERIOR, AND MARION CLAWSON, DIRECTOR OF THE BUREAU OF LAND MANAGEMENT, PETITIONERS

v.

SANTA FE PACIFIC RAILROAD COMPANY, A CORPORATION, and AZTEC LAND & CATTLE COMPANY, LIMITED, A CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of petitioners, prays that a writ of certiorari issue to review the judgment entered on November 15, 1951, by the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The oral opinion of the district court (R. 205–211) is not reported. The majority and dissenting opinions of the court of appeals (R. 215–252) are not yet reported. The opinion of the court of appeals upon an earlier phase of this case

(R. 254–259) is reported sub nom. *Krug* v. *Santa Fe Pac. R. Co.*, 158 F. 2d 317.

JURISDICTION

The judgment of the court of appeals was entered on November 15, 1951 (R. 252). By orders of the Chief Justice of January 29, 1952, and March 4, 1952, the time for filing a petition for a writ of certiorari was extended to and including April 12, 1952 (R. 261, 262). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

In 1940, the Santa Fe Pacific Railroad Company, a land grant railroad, released "any and all claims of whatever description to lands, interests therein, compensation or reimbursement therefor * * *", as required by the Transportation Act of 1940 as a condition precedent to charging the United States full commercial rates for transportation. The Act provided that "Nothing in this section shall be construed * * * to prevent the issuance of patents confirming the title to such lands as the Secretary of the Interior shall find to have been heretofore sold by any such carrier to an innocent purchaser for value." Under this saving clause, a claim is now asserted by the railroad, on behalf of Aztec Land and Cattle Company, of a right to select and secure patents to some 98,000 acres of land located in the indemnity limits of the land grant, the lands in question having

been withdrawn for forest purposes in 1898, and no valid selection having been attempted prior to the 1940 release. The questions presented are:

1. Whether, in the absence of a selection of particular lands to satisfy its indemnity claim, Santa Fe or its predecessor had any "lands" which could have been "sold" and title to which could be "confirmed" by issuance of a patent, within the meaning of the saving clause of the Transportation Act of 1940.

2. Whether a land grant railroad acquired any specific indemnity lands without selection when the total of surveyed indemnity lands, vacant and withdrawn, exceeded the railroad's total indemnity claim.

3. Whether relief in the nature of mandamus or mandatory injunction may be granted to overturn the view of the Secretary of the Interior that the release barred the claim when there is no finding that his conclusions reflect a misapprehension of his plain ministerial duty.[1]

---

[1] In the event this petition is granted, the question whether Aztec was an "innocent purchaser for value" within the meaning of the Transportation Act of 1940 will also be presented.

The following additional question may be involved although it is not clear that the court below rested its decision on the ground of estoppel: Whether an erroneous view of the Secretary of the Interior, during the years 1921 to 1940, that such withdrawn indemnity lands as those here in question were not available for selection estops the petitioner to assert that Santa Fe never acquired title to these lands because it did not make, or attempt to make, a selection. See note 9, *infra*, pp. 18–19.

STATUTE INVOLVED

The Transportation Act of 1940, sec. 321 (a) and (b), 54 Stat. 954, provided that a land grant railroad might obtain full commercial rates for transportation if it filed—

> a release of any claim it may have against the United States to lands, interest in lands, compensation, or reimbursement on account of lands or interests in lands which have been granted, claimed to have been granted, or which it is claimed should have been granted to such carrier or any such predecessor in interest under any grant to such carrier or such predecessor in interest as aforesaid. Such release must be filed within one year from the date of the enactment of this Act. Nothing in this section shall be construed as requiring any such carrier to reconvey to the United States lands which have been heretofore patented or certified to it, or to prevent the issuance of patents confirming the title to such lands as the Secretary of the Interior shall find to have been heretofore sold by any such carrier to an innocent purchaser for value or as preventing the issuance of patents to lands listed or selected by such carrier, which listing or selection has heretofore been fully and finally approved by the Secretary of the Interior to the extent that the issuance of such patents may be authorized by law.

STATEMENT

The judgment below directs petitioners to proceed to a determination of an application for a patent to some 98,000 acres of land in Arizona, without reference to a release executed by the railroad under the Transportation Act of 1940. The facts, which were stipulated by the parties, may be summarized as follows:

The Act of July 27, 1866, 14 Stat. 292, provided for the grant of public lands to the Atlantic and Pacific Railroad (hereinafter referred to as "A & P") in aid of construction of the railroad. The grant was of odd-numbered sections within specified limits adjoining the road, called the "place" lands, with provision for the selection of other odd-numbered sections in further limits, called the "indemnity" limits, to make up losses in place lands which might result because of previous grants to homesteaders and the like. The railroad was thereafter constructed through what is now New Mexico and Arizona (R. 23–25).

In 1886, A & P executed a contract for the sale to Aztec Land and Cattle Company (hereinafter called "Aztec") of a little more than 1,000,000 acres, comprising all the odd-numbered sections of both place and indemnity lands within certain boundaries, at a price of 50 cents per acre, the total price of $500,000 having already been paid in 1884 and 1885 (R. 25, 46-52). Aztec had been

incorporated in 1884, substantial portions of its stock being held by J. & W. Seligman & Co., a New York banking firm, and the Atchison, Topeka & Santa Fe Railroad Company, which is the parent company of what is popularly known as the Santa Fe System (R. 29, 30, 32). Among the lands covered by the contract were the 98,000 acres involved in the present case which were described by section numbers even though they were unsurveyed. The following year a selection of indemnity lands including these 98,000 acres was filed, but was rejected by the Secretary of the Interior because the lands had not been surveyed (R. 26).

The contract had provided for conveyance of the lands within two years. It was only partially performed and a resulting dispute between the parties was submitted to arbitration which resulted in an award on September 26, 1894, determining that A & P owed Aztec some $213,000 plus interest because of failure to convey some 427,000 acres (R. 35, 132). Aztec's books were changed so as to reflect a claim for money due rather than lands due (R. 131, 134, 139). In 1896, a mortgage on property of A & P was foreclosed and Santa Fe Pacific Railroad Company (hereinafter called Santa Fe) became the successor in interest of A & P, vested with all its rights and privileges under the land grant (R. 23–24). Aztec thereupon wrote the claim for money due from A & P off its books, which were bal-

anced by writing up the lands it had received to the full amount paid, the annual report (1897) explaining "our said claim was wiped out by the foreclosure judgment" (R. 142).

On August 17, 1898, the 98,000 acres were withdrawn by Executive Proclamation as a part of a forest reserve and they have since been so administered, being now included in the Coconino and Sitgreaves National Forests (R. 27). In 1905, Santa Fe executed a quitclaim deed of all its right, title and interest in the 423,000 acres remaining under the 1886 contract, which stated "this deed shall not be construed as an assumption by said grantor of [the 1886 contract] or of any obligations therein contained" (R. 57).[2]

On December 18, 1940, in order to receive the rate benefits provided by the Transportation Act of 1940, Santa Fe filed a release, accompanied by a list of purchasers for value which included the name of Aztec and a description of the 98,000 acres involved here (R. 41, 58–59). On June 26,

[2] From the time of the organization of Aztec until 1928, the dominating influence, by reason of stock ownership, advances for working capital secured by Aztec bonds, and interlocking directorships and officerships, was Atchison and Seligman. Atchison controlled A & P and Santa Fe, and there was a community of interest between Atchison and Seligman (see R. 29–34). Thus, E. P. Ripley, who signed the quitclaim deed as president of Santa Fe, was a director of Aztec at that time (R. 58, 122A). Aztec accepted the deed, and a release of claims under the 1886 contract was signed by its president, W. B. Jansen, who was also assistant to the president of Atchison (R. 115, 122A).

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1942, under procedures prescribed by the Secretary of the Interior, Santa Fe filed a selection and application for patents to these lands (R. 28). Departmental decisions rejected the claim on the ground that since a railroad had no interest in specific indemnity lands until selection and since no selection had been filed prior to execution of the release, Santa Fe had no title it could have conveyed to Aztec, so that the saving clause of the Transportation Act (*supra,* p. 4) was inapplicable (R. 6–7, 63–70).

Thereupon, this suit was instituted to compel Department of Interior officials to consider the application without regard to the release. Both parties moved for summary judgment and the motion of the plaintiffs (respondents here) was granted. The resulting judgment was reversed upon appeal. *Krug* v. *Santa Fe Pac. R. Co.,* 158 F. 2d 317 (1946). The opinion by the then Chief Justice Groner (R. 254–259) agreed that as a general rule selection is necessary to vest any right in specific indemnity land in a grantee, but ruled that an exception exists if there is a deficiency of indemnity land to satisfy place losses. The case was accordingly remanded to determine whether there had in fact been such a deficiency.

After remand, the matter was resubmitted to the Department of the Interior which found (1) that Aztec was not in fact an innocent purchaser for value within the purview of the Transportation Act because it had been subject to the

control of the same interests which dominated A & P and Santa Fe and (2) that there had been no deficiency since December 31, 1924 (R. 189, 193, 202). These findings were brought before the court in the defendants' (petitioners here) answer.

The facts, as summarized above, were stipulated by the parties, along with the details of the amount of losses in place lands and the amount of lands in the indemnity areas of various categories from 1872 to 1940, as set out in schedules attached to the Departmental decision (R. 23–38). After hearing, the district court orally delivered an opinion concluding that judgment should be rendered for the plaintiffs (R. 205–211), and findings of fact, conclusions of law and judgment were accordingly entered (R. 38–44). The findings of fact stated that at the time of the withdrawal in 1898 (*supra,* p. 7) and at all times thereafter up to 1940 the unsatisfied place losses exceeded the surveyed indemnity lands available for selection and that there had therefore been a deficiency of not less than 100,000 acres (R. 40). Its conclusions of law were (1) that in view of the deficiency the withdrawal of 1898 was void and, at the time of the release, Santa Fe "had a right to select the lands" in the interest of Aztec, (2) that this right to select and apply for issuance of a patent was not barred by the release, and (3) that Aztec was and is an innocent

purchaser for value in the sense of the Transportation Act.

The Court of Appeals affirmed, Chief Judge Stephens dissenting in a detailed opinion (R. 215–252).

REASONS FOR GRANTING THE WRIT

The Secretary of the Interior found that neither Santa Fe, which had released its land grant claims, nor Aztec, the alleged purchaser, had any right to the lands in controversy—lands which comprise a valuable portion of our national forest reserves. The reversal of the Secretary's ruling by the courts below is predicated upon (1) a misconceived construction of the rights released by respondent Santa Fe under Section 321 (b) of the Transportation Act of 1940, (2) an erroneous application of the principles established by this Court's decisions governing land grant claims, and (3) an improper substitution of a *de novo* judicial determination for a decision committed by Congress in the first instance to the Secretary's discretion. Because the result is at war both with this Court's decisions and with the broad congressional effort to terminate the long history of land grant claims, and leads to unjust enrichment of the respondents at the expense of the public domain, we submit that review and reversal are warranted.

1. The 98,000 acres of land sought by respondents contain some of the best virgin ponderosa

pine timber in the State of Arizona and are worth in excess of $7,500,000. Aztec, which asserts a claim as purchaser of these lands for less than $50,000 (50¢ per acre) from Santa Fe's predecessor, wrote this supposed claim off its books in 1897, and neither respondent at any time between 1887 and 1940, the year of Santa Fe's release, ever presented any such claim to the Department of the Interior.[3] The lands constitute alternate sections through national forest lands which have been operated under a sustained yield production program which is important to the economic and social stability of the part of Arizona where they are located. Transfer of these lands to private ownership, probably followed promptly by cutting of the timber, would disrupt this sustained yield program and seriously threaten the economy of the area. Thus, the judgment below awards a windfall to Aztec to the great prejudice of important public interests. Such a result is warranted only if the statute compels it after resolving all doubts in favor of the Government. *Northern Pacific R. Co.* v.

[3] The court below erroneously stated (R. 218) that Santa Fe was contractually bound to exercise its right to select indemnity lands on behalf of Aztec and that "Any failure on Santa Fe's part would have rendered it liable in damages." Santa Fe's quitclaim deed to Aztec expressly provided (R. 57) that it was not to "be construed as an assumption by said grantor [of the 1886 contract of Santa Fe's predecessor for conveyance of the lands] or of any obligations therein contained."

United States, 330 U. S. 248, 257–258.[4] Far from compelling that result, the Transportation Act of 1940, when read in the light of applicable land grant principles, precludes it.

2. Like the district court (R. 42), the court below held (R. 218) that Santa Fe had, before 1940, a "right to choose or select" indemnity lands, that this right had been conveyed to Aztec, and that the right therefore survived the release by Santa Fe of its land grant claims. This holding misconstrues the exception Congress allowed in Section 321 (b) of the Transportation Act of 1940 (*supra*, p. 4) when it declared that a carrier's release executed under that provision would not "prevent the issuance of patents confirming the title to such lands as the Secretary of the Interior shall find to have been heretofore sold by any such carrier to an innocent purchaser for value * * *." For it seems clear that rights "to choose or select" lands not already ap-

[4] Recognizing the evils of sales of large areas of railroad land grants in a block (see *Great Northern Ry. Co.* v. *United States*, 315 U. S. 262, 273–4), Congress only two or three years after the grant to A & P imposed restrictive provisions, both in new grants and in amendments to existing grants, for the purpose of restricting sales to actual settlers. The Congressional policy is illustrated by the statement of Representative Sargent of California in 1870 (Cong. Globe, 41st Cong., 2d Sess., Pt. 4, p. 3105) in connection with a proposed land grant in Oregon: "We compel the companies to sell the lands only to actual settlers at not more than $2.50 per acre, and in lots of not more than one hundred and sixty acres." See *United States* v. *Northern Pacific Ry. Co.*, 311 U. S. 317, relating to the construction of a similar restriction.

propriated to the carrier's claim were not "lands", and that sales of such rights were not such sales of "lands" as Congress excepted from releases under Section 321 (b).

It had long been settled that, at least where there were sufficient indemnity lands to satisfy the carrier's losses in place, a land grant carrier acquired no right or title to any specific indemnity lands, such as those involved here, until it made a selection among the indemnity lands available to satisfy its place losses. *United States* v. *Southern Pacific R. R. Co.*, 223 U. S. 565, 570; *Southern Pacific Railroad Co.* v. *Bell*, 183 U. S. 675, 680–682. Because this was so, Congress—which was familiar with the variety of problems presented by unsettled land grant claims, including the problem of unexercised rights to select indemnity lands, see *Krug* v. *Santa Fe P. R. Co.*, 329 U. S. 591, 598—can scarcely be deemed to have included floating "rights of selection" among the conveyances it excepted when it permitted the Secretary to issue patents merely "confirming the *title* to such *lands*" as he found to have been sold to an innocent purchaser. At the time it executed its release under Section 321 (b), Santa Fe had never acquired any title to the lands it now claims on behalf of its "purchaser"; for it had never selected these lands or any of the other lands available for many years to satisfy its indemnity

claims, and, as we show below, the available indemnity lands were more than sufficient.*

There is no quarrel here over the premise of the court below (R. 218) that, prior to execution of its release, Santa Fe's right to select indemnity lands was a "vested interest." It is equally clear, however, that when Congress in Section 321 (b) "wrote finis to all these claims for all railroads which accepted the Act by executing releases" (*Krug* v. *Santa Fe P. R. Co., supra,* at 598), it sought relinquishment of just such vested interests in exchange for waiver of the Government's land grant advantages. To hold now that "sales" of "rights of selection" were such sales of specific "lands" as to be excluded from the release is to expand the plain language Congress wrote and to defeat the objective of terminating unsettled claims to unspecific public lands.

3. Apparently as an alternative ground for its decision, the court below approved the district court's finding that Santa Fe's place land losses, at all times to and including 1940, "exceeded the

* Where the indemnity lands available to satisfy the carrier's place losses were less than the total of the losses, "the lands in the indemnity limits necessarily were appropriated to satisfy the losses * * *. *United States* v. *Northern Pac. Ry. Co.*, 256 U. S. 51, 65. But this was so because, in view of the deficiency, "no selection was required" (*ibid.*); not because a "right of selection" was ordinarily the same as a right or title to any specific, identifiable indemnity lands.

surveyed lands within the indemnity limits of the grant available for selection" (R. 40), and concluded that because of this deficiency Santa Fe had acquired title without selection to all of the available indemnity lands, including those in controversy here (R. 218). While the conclusion might follow from the finding, the finding itself is flatly refuted by the stipulated facts in the record and rests upon a misapplication of this Court's decision in *United States* v. *Northern Pac. Ry. Co.*, 256 U. S. 51 (1921).

The uncontroverted findings of the Department of the Interior show that, at all times from 1924 to 1940, surveyed indemnity lands available for selection exceeded Santa Fe's unsatisfied place losses (R. 204A). These findings rest upon the proposition, announced by this Court in *United States* v. *Northern Pac. Ry. Co., supra,* that the Government's withdrawal of indemnity lands for forest reserve or other purposes could not have the effect of defeating the carrier's right of selection where the withdrawal left a deficiency in indemnity lands available to satisfy losses in place. Where they created such a deficiency, "the withdrawals were void and the company's rights remained as if the withdrawals had never been made." *United States* v. *Northern Pacific Ry. Co.*, 311 U. S. 317, 345, 365. And so surveyed areas of the withdrawn lands were available, as

the Secretary found in the present case, for selection. *Ibid.*[6]

Both lower courts acknowledged that under the *Northern Pacific* decisions the Government's withdrawal here, since it left a deficiency in indemnity lands available for selection, was ineffective to bar the carrier's right of selection (R. 42, 218). Yet both courts proceeded to hold that, in determining whether there had been a deficiency in indemnity lands in the years preceding 1940, the withdrawn lands were to be treated as having been unavailable for selection. The error resulting from these inconsistent conclusions is laid bare in the carefully reasoned dissent of Chief Judge Stephens (R. 241–244). If withdrawn lands could be selected if necessary, as the *Northern Pacific* cases hold, then obviously they must be considered as having been "available for selection" in determining whether a deficiency existed so as to render selection unnecessary. As of 1940 (see R. 204A), the surveyed withdrawn acres alone (568,470.17) by far exceeded the unsatisfied place losses (379,273.17),[7]

[6] Only *surveyed* lands, vacant or withdrawn, were available for selection. *United States* v. *Northern Pacific Ry. Co.*, 311 U. S. 317, 343–345.

[7] This figure is derived from the table of undisputed data appearing at R. 204A, by subtracting from Santa Fe's total losses in place (1,454,087.12 acres, as shown at the top of the last column of the table) the number of acres which had been selected by 1940 (1,074,813.95, as shown in the column headed "Area Selected").

so that selection was necessary in order to identify which acres were to be claimed by Santa Fe even if its entire losses were to be satisfied from withdrawn lands.* If, rather than filing a release, Santa Fe had chosen to retain its right to indemnity lands, it would have had to file a selection of some portion of the excessive surveyed acres available before any specific lands could have been conveyed to it. But the courts below, ignoring the plain fact that they are even now allowing a post-1940 selection from the national forests, held that the lands in controversy somehow became identified before 1940 as belonging to Santa Fe without selection.

In a word, the self-contradictory reasoning underlying the decision below may be summarized as follows:—(1) Because there was a deficiency of indemnity lands to satisfy its place losses prior to 1940, Santa Fe acquired title, without selection, to those indemnity lands which were available. (2) Contrary to the *Northern Pacific* cases, the withdrawn forest lands were not available as indemnity lands, which accounts for the deficiency. (3) However, Santa Fe acquired, without selection, specific portions of the withdrawn for-

*These figures ignore, of course, the total of 177,892.83 vacant surveyed acres of idemnity lands (R. 204A) which were on any theory available for selection in 1940 and which would have more than satisfied the present claim for 98,000 acres. Chief Judge Stephens took the position (R. 251) that withdrawn lands could be claimed only after all vacant surveyed lands had been exhausted.

est lands which were *not available*—lands which, if they had been available, would have made the total of available indemnity lands greater than Santa Fe's claims and would thus have precluded the carrier's acquisition of any identifiable areas without selection. We submit that this clearly illogical application of the *Northern Pacific* decisions, affecting lands which have comprised a valuable portion of the Nation's forest reserves for over fifty years, requires review and correction by this Court.*

* In the courts below respondents argued that in the years from the first *Northern Pacific* decision in 1921 (256 U. S. 51) to the second *Northern Pacific* decision in 1940 (311 U. S. 317), the Secretary of the Interior had taken the position that *unsurveyed* indemnity lands were to be taken into account in determining whether there was a deficiency to satisfy the carrier's losses in place. Accordingly, respondents pointed out, until this Court's 1940 decision reversed his ruling, the Secretary had improperly rejected attempted selections of withdrawn lands like those involved here. The district court, observing that the "principal test case was not finally and definitively determined until 1940" (R. 210), appears to have accepted the conclusion from these arguments that the Government is estopped to claim now that the surveyed portions of the withdrawn lands must be included in determining whether there was a deficiency in the indemnity lands available for selection by Santa Fe in the years before 1940. And while this estoppel argument is not clearly invoked by the majority below, there are suggestions in its opinion (see R. 218) which indicate that it may have been given weight, and Chief Judge Stephens dissenting (R. 244–250) saw a need to treat and dispose of it. It seems sufficient to point out here that, insofar as this estoppel theory (refuted at length in the dissent of Chief

4. Substituting their view of the law and the facts—a view from which Chief Judge Stephens vigorously dissented—for that of the Secretary, the majority below concluded that relief in the nature of mandamus was proper here because "the Secretary was plainly wrong" (R. 219). The court conceded that administrative determinations "should not be reversed by means of injunction or mandamus merely because the court may have reached another conclusion" and that "mandamus will lie against executive or administrative officers only when [an administrative officer's] duty in a particular situation is so plainly prescribed as to be free from doubt and

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Judge Stephens, R. 244–250) may be invoked as a basis for sustaining the decision below, it is in itself a further reason for review by this Court. For the notion that the Secretary's erroneous view of the law estops the Government to assert defenses to claims against it conflicts squarely with this Court's decisions in such cases as *United States* v. *California*, 332 U. S. 19, 39–40; *United States* v. *San Francisco*, 310 U. S. 16; and *Utah Power & Light Co.* v. *United States*, 243 U. S. 389, 409.

It bears mention, moreover, that the well-known history of land grant litigation, in which the carriers have never hesitated to challenge the Secretary's rulings in court, lends a striking incongruity to the suggestion—tendered by a carrier engaged in an effort to reverse the Secretary—that the carrier should be viewed as never having had a right, which this Court has affirmed, because it was mistakenly disputed by the Department. Santa Fe had plenty of opportunity to file a selection before 1940, and to contest the Secretary's decision if he had rejected the selection on the ground that enough unsurveyed lands existed to satisfy the railroad's claim.

equivalent to a positive command." (*Ibid.*)[10] Holding, however, that the Secretary was "plainly wrong," the court deemed mandamus and injunctive relief a proper means of compelling what it regarded as the Secretary's "purely ministerial" duty: "He need only issue the patents." (*Ibid.*)

Even assuming that the conclusions of the court below on the merits are, on balance, correct, we think the grant of mandamus in this case exceeds the limitations upon such relief marked out by the decisions of this Court (*supra,* note 10). When, in Section 321 (b) of the Transportation Act, Congress provided that a carrier's release would not prevent "the issuance of patents confirming the title to such lands *as the Secretary of the Interior shall find* to have been heretofore sold" (emphasis added), its language would seem unmistakably to have contemplated a "finding" requiring legal and factual judgments by the Secretary. Here, appraising undisputed data attached to his decision as appendices (R. 202–204A), the Secretary found that there had been no deficiency after 1924 in the indemnity lands available for selection by Santa Fe. Using the

[10] *United States ex rel. Girard Co.* v. *Helvering*, 301 U. S. 540, 543; *Wilbur* v. *United States*, 281 U. S. 206, 218–219; *Work* v. *Rives*, 267 U. S. 175, 177–178; *Ness* v. *Fisher*, 223 U. S. 683; *Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316, 324, *et seq.*; *Litchfield* v. *Register and Receiver*, 9 Wall. 575, 577; *Decatur* v. *Paulding*, 14 Pet. 497, 515.

same data (R. 37–38), the district court made a contrary finding without attempting to explain wherein it disagreed with the departmental views.[11] The court of appeals likewise simply ignored the administrative finding. Thus, the courts have not even given the administrative finding the respect to which a lower court decision would be entitled on appeal. Rather than simply enforcing a ministerial duty, the courts have undertaken to pass upon the various issues involved *de novo* and have concluded for themselves that Santa Fe is entitled to select the lands for Aztec.[12]

The question posed by this mode of reversing the Secretary's ruling on a claim to public lands was presented, but not reached, in *Krug* v. *Santa Fe P. R. Co., supra.* See 329 U. S. at 597. It remains important.

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[11] The findings of fact and conclusions of law make no reference to any departmental decisions except to state the fact of rejection of Santa Fe's application in 1944 (R. 38–43).

[12] The district court stated the view that because of the Administrative Procedure Act, 60 Stat. 243, 5 U. S. C. 1009, it was empowered to review the administrative decision as upon appeal (R. 208). The court of appeals did not so hold, and, for reasons stated in the Government's briefs in *Krug* v. *Santa Fe P. R. Co., supra* (October Term, 1946, Nos. 97, 98, pp. 47–54), *Robertson* v. *Chambers*, 341 U. S. 37 (October Term, 1950, No. 295, pp. 53–54), and *Blackmar* v. *Guerre*, decided March 3, 1952 (October Term, 1951, No. 361, pp. 26–37, 69), we do not believe that review by way of mandamus has been so expanded.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

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OSCAR L. CHAPMAN, Secretary of the Interior, and MARION CLAWSON, Director of the Bureau of Land Management, *Petitioners*

v.

SANTA FE PACIFIC RAILROAD COMPANY, a Corporation, and AZTEC LAND & CATTLE COMPANY, LIMITED, a Corporation.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 702

OSCAR L. CHAPMAN, Secretary of the Interior, and MARION CLAWSON, Director of the Bureau of Land Management, *Petitioners*

v.

SANTA FE PACIFIC RAILROAD COMPANY, a Corporation, and AZTEC LAND & CATTLE COMPANY, LIMITED, a Corporation.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

I. The present case is sui generis, and the issues which it involves are consequently not of public importance.

This is the last railroad land grant case now in litigation, or which, so far as respondents are aware, can possibly come into litigation. Petitioners do not even faintly suggest that the present case is representative of any others. Their Petition accentuates (Pet. 10-11) the value of the lands in controversy (which, as it happens, nowhere appears in the record), and, obviously begging the ques-

tions at issue, asserts (Pet. 11) that "the judgment below awards a windfall to Aztec to the great prejudice of important public interests." Since respondents, as well as every court which up to now has considered this litigation, are of opinion that it is the respondents who are entitled to these lands as a matter of law, they could with somewhat more justice assert that a contrary view awards a windfall to the United States to the obvious prejudice of vested private interests—though assuredly such a counter-assertion would neither clarify the issues nor throw light on whether this case is of sufficient public importance to warrant review.

This, clearly, is not such a case. There is involved no question as to the general effect of releases under the Transportation Act of 1940, such as was considered in *Krug* v. *Santa Fe P. R. Co.*, 329 U. S. 591, but only the far more particularized inquiry whether, in respect of lands which, as petitioners concede (Pet. 7), were specifically excepted, by tract-by-tract description, from the release actually executed (R. 27-28, 41, 58-59), the respondent Aztec Land & Cattle Company was "an innocent purchaser for value", in law and in fact, within the terms of Section 321(b) of that Act. Since no other litigation can possibly raise this narrow point, it follows that this case is, literally and exactly, *sui generis*. Respondents could rest their opposition to the Petition at this point, stressing that it is the denial of the writ which would effectuate what petitioners rightly call (Pet. 10) "the broad congressional effort to terminate the long history of land grant claims"—adding only that this particular application for selection has now been pending since June 1942 (R. 8), for nearly ten years, and has been in litigation since March 1944 (R. 1), a period of over eight years.

Respondents would be unwilling, however, by such summary statement to permit the drawing of an inference that they have the slightest doubt of the correctness of the decision below. Nor are respondents willing to pass without

contradiction the glaring distortion of the facts, discussed below at pp. 3-7, which has become interwoven into the Petition. Respondents, therefore, turn to the merits, albeit briefly, because in view of the nature of the subject matter, they do not feel justified in detaining the Court unduly with the minutiae, the history, or the now essentially obsolete learning developed in the field of railroad land grants when such grants were still a subject of live public interest, and when cases concerning them could come here as of right, on appeal. *E.g.*, *United States* v. *Northern Pac. R. Co.*, 256 U. S. 51 (appeal from C. C. A. 9); *Santa Fe Pac. R. R.* v. *Work*, 267 U. S. 511 (appeal from App. D. C.); *United States* v. *Northern Pac. R. Co.*, 311 U. S. 317 (direct appeal from E. D. Wash. under special Act of Congress).

II. The case does not present any issue as to the scope of judicial review of normal administrative action.

By way of preliminary, however, respondents desire to deal with the only question which, on the face of the Petition, might be thought to bear upon litigation extending beyond railroad land grants, *viz.*, the asserted disregard by the courts below of accepted standards for judicial review of normal administrative action. But the record makes it abundantly clear that no such generalized question arises or can possibly arise on the present facts; that the only issue of fact here was one tried by the District Court pursuant to the mandate on the first appeal; and that the "findings" for which inviolability is now sought were made *ex parte*, after the petitioners had lost on the first appeal, and were no more than a memorandum to enable counsel for the petitioners to draft a responsive pleading.

Petitioners' references to "findings" (Pet. 9, 15, 21), and to what the Secretary allegedly "found" (Pet. 8, 10, 20), flow from their erroneous statement of the travel of the case. After summarizing Chief Justice Groner's opinion on the first appeal (R. 254-259), petitioners say (Pet. 8-9):

The case was accordingly remanded to determine whether there had in fact been such a deficiency.

After remand, the matter was resubmitted to the Department of the Interior which found (1) * * * and (2) * * *. These findings were brought before the court in the defendants' (petitioners here) answer.

The foregoing statement involves a demonstrable distortion of the facts.

The applicants, respondents here, did not resubmit the case to the Department of the Interior. The Court of Appeals on the first appeal did not resubmit the case to the Department of the Interior. The record shows, and the parties have stipulated (Par. 40, R. 37), that the only resubmission was by the Attorney General, who requested the Department of the Interior to make "administrative findings" so that he might be in a position to file an answer (R. 192).

Even in the absence of the stipulation, the foregoing would be perfectly clear from the record:

After the first appeal, the case was remanded "for trial on the merits, if and when an answer is filed by the Secretary" (R. 259). The mandate of the Court of Appeals (R. 15) ordered that the cause be "remanded to the said District Court," and the District Court's order on that mandate gave the defendants—petitioners here—90 days in which to file answers or otherwise plead (R. 16). That is to say, the case was remanded for a trial *by the District Court*. The only resubmission to the Department of the Interior was by the Attorney General, and that was made two days after the District Court had fixed the time for the defendants, petitioners here, to answer (R. 15-16; Fdg. 40, R. 37; R. 192). Thereafter, the time to answer having been extended (see docket entries, R. 46), the defendants in August 1947 filed an answer (R. 16-22) which incorporated the "administrative findings" made by the petitioner Chapman in July (R. 189-203).

The "findings" referred to throughout the Petition, therefore, were not findings made in the regular course of Land Office proceedings, after notice and hearing, they were no more than a memorandum from client to counsel, made *post motam litem* to enable counsel to formulate a responsive pleading after the Court of Appeals had held that the case was not one for summary judgment. It was because of the nature of the "findings" in question that both courts below, as petitioners say (Pet. 21) "simply ignored the administrative finding"—and properly so. For certainly, up to now at any rate, a public officer, when sued and when shown to be wrong as a matter of law, has not been able successfully to put forth his own subsequent *ex parte* determination as a conclusive bar to relief against him. The court below had already held, long previously, that an *ex parte* ruling by the Secretary of the Interior, made without a hearing, "cannot be treated as a final decision in the exercise of the quasijudicial power reposed in the Secretary" (*Wilbur* v. *Lyders*, 59 F. 2d 877, 879); and the Government had acquiesced in that holding.

Petitioners' view as to the sanctity of the interdepartmental memorandum here involved—and that is all that document (R. 189-203) amounts to, notwithstanding it was labelled "Findings of Fact"—would, assuredly, set a new low-water mark in the perversion of administrative processes.

Once the record is correctly read, however, once it is borne in mind that the case was simply remanded to the District Court for a trial by that court as to whether or not a deficiency existed, it becomes apparent that the only question of reviewability involved is whether the concurrent findings of the District Court (Fdg. 9, R. 40) and of the Court of Appeals (R. 218), that there was a deficiency, is now to be subjected to further review. Settled standards of wise judicial administration have determined that question in the negative. *E.g.*, *United States* v. *O'Donnell*, 303 U. S. 501, 508; *Allen* v. *Trust Co. of Georgia*, 326 U. S.

630, 636; *Comstock* v. *Institutional Investors*, 335 U. S. 211, 213-214.

Moreover, it is clear that the Secretary's memorandum for the Attorney General bearing the heading "Findings of Fact" does not turn on any questions of fact, but actually deals only with two questions of law. First, since the basic data relating to the land grant acreages involved had been stipulated by the parties (R. 37, 204A), the only issue between them relating to deficiency *vel non* was whether withdrawn lands which had been consistently held to be unavailable for selection could, years later, be retroactively held to be available for that purpose. That issue, plainly, was one of law. The second question concerned the status of Aztec as "an innocent purchaser for value" within Section 321(b) of the Transportation Act of 1940. Here also the facts were stipulated and rested entirely on documents, as the District Judge specifically noted (R. 208). The question was whether that statutory expression could be retroactively applied to invalidate a transaction originally entered into over half a century prior to the passage of the Act; and that question, equally plainly, was also one of law.

Even if the Secretary's resolution of those questions of law had followed, as it did not, a hearing in the normal course of Land Office procedures, the courts would not have been concluded by that officer's views of the law; the contrary has long been established. *Wisconsin Central R'd Co.* v. *Forsythe*, 159 U. S. 46, 61; *Wisconsin Central R'd Co.* v. *United States*, 164 U. S. 190, 209-210. Moreover, although strongly urged by the Government to do so, this Court in recent years has consistently declined to dispose of railroad land grant controversies on the footing that the Secretary's determination was entitled to immunity in the absence of a showing that he was right as a matter of law in deciding what he did. *Santa Fe Pac. R. R.* v. *Work*, 267 U. S. 511, 517; *Krug* v. *Santa Fe Pac. R. Co.*, 329 U. S. 591, 597. Indeed, it may not be amiss to point out that almost all of the law dealing, as does this case, with rights to in-

demnity lands as against the United States, had been formulated in decisions which overturned determinations made by the Secretary of the Interior. *Payne* v. *Central Pac. Ry. Co.*, 255 U. S. 228; *Payne* v. *New Mexico*, 255 U. S. 367; *Santa Fe Pac. R. R. Co.* v. *Fall*, 259 U. S. 197.[1]

It follows that the issue as to judicial review presented by the Petition does not arise on this record, and that the issues of reviewability actually in the case have been determined in accordance with the established doctrines of this Court.[2]

III. The decision below was correct on the merits.

The lands here in question were, as has been noted, specifically excepted, by particularized description of each tract involved, from the release executed by the railroad in December 1940 (R. 27-28, 41, 58-59). But although the time for filing releases expired, by the terms of Section 321(b) of the Transportation Act of 1940 (Pet. 4), on September 17, 1941, the Department did not promulgate its regulations covering "Issuance of Patents for Lands Sold to Innocent Purchasers for Value" by the railroad carriers which had released their land grant claims until after the statutory period for executing releases had expired (Circular No. 1500, December 10, 1941, R. 59-62). Respondents' formal application was filed a few months later, in June 1942 (R. 64). That application was rejected by the petitioner Chapman, then Assistant Secretary, on the

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[1] It should also be noted that the form of the final judgment herein (R. 43-44) is that specifically approved in *Payne* v. *Central Pac. Ry. Co.*, 255 U. S. 228, 238.

[2] Since the Secretary's determinations were properly dealt with under the law in effect prior to the effective date of the Administrative Procedure Act, there is no need to inquire whether Section 10(e) of that statute permits an even wider scope of review of erroneous legal determinations by public officers. See *Snyder* v. *Buck*, 75 F. Supp. 902 (D. D. C.), vacated because abated, 179 F. 2d 466 (App. D. C.), affirmed, 340 U. S. 15; compare Pet. 21, n. 12.

ground that it had been preceded by the release (R. 63-84). The present action followed, and judgment was entered in favor of the respondents by the District Court.[3] On appeal, the court below held that such a judgment was authorized if there was a deficiency in the grant, in which event the lands were identified without the formality of a selection. However, since no answer had been filed, the allegation in the complaint that a deficiency existed (Par. 11, R. 5) remained open, so that the court below remanded the case to the District Court for a determination of that operative fact, "if and when an answer is filed by the Secretary." *Krug* v. *Santa Fe Pac. R. Co.*, 158 F. 2d 317; see R. 253-259, 13-16. This holding followed from this Court's decisions in the *Forest Reserve* Case (*United States* v. *Northern Pac. Ry. Co.*, 256 U. S. 51, 65) and in *St. Paul & Pac. R. Co.* v. *Northern Pac. R. Co.*, 139 U. S. 1, and was moreover in accord with decisions of the Interior Department (*Vicksburg, etc. R. Co., Quapaw Land Co., transferee*, 52 L. D. 191; *Santa Fe Pacific Railroad Company*, 56 I. D. 376), the decision last cited being a ruling by the petitioner Chapman dealing with the identical grant now in controversy.[4]

At the conclusion of the trial which followed the remand, the District Court found as a fact that there had been a deficiency in the Santa Fe grant prior to 1898 and at all times thereafter to and including 1940 (Fdg. 9, R. 40), and

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[3] See opinion of Duncan, J., pp. 40-49 of Joint Appendix, No. 9167, U. S. Ct. of App. for the D. C., not printed.

[4] "It seems clear from the rulings above referred to [*United States* v. *Northern Pac. R. Co.*, 256 U. S. 51; *Vicksburg, etc. R. Co.*, 52 L. D. 191] that upon the finding that the lands within the indemnity limits of the grant to the Santa Fe Pacific Ry. Co. were insufficient to satisfy its indemnity rights, its transferee, the Santa Fe Pacific Railroad Company must be deemed to have earned the remaining lands subject to selection without regard to the fact whether application therefor had been made or not * * *." *Per* Chapman, Assistant Secretary, 56 I. D. at 379, decided August 19, 1938.

the court below, on the second appeal, concurred in this finding (R. 218). This was in accord with the finding made by the petitioner Chapman in 1938, in his decision in *Santa Fe Pacific Railroad Company*, 56 I. D. 376, 379, where he referred to "the known insufficiency of the land within the indemnity limits of the grant to the Santa Fe Pacific Railroad Company to satisfy its rights of indemnity for losses of land in the place limits at the time of the withdrawal of November 26, 1934."

The finding just quoted was made before the present litigation was commenced. Thereafter, in support of his motion for summary judgment, the petitioner Chapman made affidavit, see R. 255-256, that he was without knowledge or information sufficient to form a belief as to the truth of the allegation of deficiency contained in paragraph 11 of the complaint, and, after the basic question was adversely decided on the first appeal, he made, for the information of the Attorney General, "administrative findings" to the effect that there was no deficiency in the Santa Fe grant after 1924 (R. 202-203).

The difference between, on the one hand, the finding made by the District Judge, by the Court of Appeals, and by the petitioner Chapman as Assistant Secretary in 1938 before this litigation had commenced—all to the effect that there was a deficiency—and, on the other, the "administrative findings" submitted by the latter officer as Under Secretary in 1947, after the first appeal herein had been decided adversely to his original decision in this case—to the effect that there was no deficiency after 1924—does not turn on any dispute as to the basic acreage figures; those latter figures were prepared by the Bureau of Land Management and have been stipulated to be true (R. 37). The figures now relied on by petitioners to show "no deficiency" are not basic figures, but were arrived at by adding and subtracting those basic figures.

Prior to 1940, the Secretary of the Interior had held that, in ascertaining whether a deficiency existed, he could take

into account unsurveyed indemnity lands as well as surveyed indemnity lands (R. 176-187); he was not shown to be wrong on this point until *United States* v. *Northern Pacific Ry. Co.*, 311 U. S. 317, 344 (Point 7). The Secretary's present position (R. 202-203), that there was no deficiency after 1924, is based upon the view that, because it has finally been held that a withdrawal which creates a deficiency is invalid, therefore the withdrawals must be disregarded in determining whether a deficiency ever existed at any time.[5] This theory was rejected by both courts (R. 210, 218), and rightly so; because, as this Court held in the final *Northern Pacific* case, first, a withdrawal which creates a deficiency is totally void, not simply to the extent of the deficiency (311 U. S. at 364-365, Point 15); and, second, the invalid withdrawal is not cured by a subsequent restoration which more than makes up the deficiency (311 U. S. at 365-366, Point 16).[6] That is to say, the mere existence of sur-

[5] The statement in the Petition (Pet. 15) that "The uncontroverted findings of the Department of the Interior show that, at all times from 1924 to 1940, surveyed indemnity lands available for selection exceeded Santa Fe's unsatisfied place losses (R. 204A)" espouses the Secretary's theory, and so might be argumentatively accurate were it not for the words "uncontroverted findings"—which are inaccurate on any footing: (1) Respondents stipulated the correctness of only the basic acreage figures (R. 37), not of the Secretary's use of those basic figures. (2) For the reasons set out in Point II, *supra*, pp. 3-7, respondents emphatically deny that the Secretary made any "findings" in the sense in which that term is normally applied to determinations of fact made after a judicial or even after a quasi-judicial hearing.

[6] The United States had argued the contrary, urging (U. S. Br. on Reargument, No. 3, Oct. T. 1940, pp. 234-238) that "it was error to hold that withdrawals which left insufficient lands to satisfy the losses were wholly invalid, instead of invalid only to the extent of the deficiency", and that "it was error to disregard subsequent restorations and surveys, because, to the extent that surveyed lands were subsequently available for selection, the United States was once more in a position to perform its obligations under the contract."

veyed unwithdrawn lands at a given time does not determine either the legality of a particular withdrawal at some other particular time, nor does it establish whether the particular withdrawal in question created a deficiency in the land grant sense.

Otherwise stated, the legality of a withdrawal and the existence of a deficiency must be determined on the spot, without regard to subsequent events. Or, as Mr. Justice Holmes with his customary felicity phrased it in *Santa Fe Pacific R. Co.* v. *Fall*, 259 U. S. 197, 199—

> If, as Chief Justice Shaw put it, a piepoudre court could have been summoned and the matter determined forthwith, the Secretary would have been bound to act on the facts as they then appeared, and could not have elected to wait for better days.

The concurrent findings of the courts below that there was in fact a deficiency in the grant (Fdg. 9, R. 40; R. 218) are therefore based on correct principles of railroad land grant law—and on an ample evidentiary foundation as well, as the calculations drawn from the basic, stipulated, acreage figures show. These last, for the information of the Court, have been placed in the Appendix hereto, *infra*, pp. 17-21.[7]

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[7] The comments in the Petition (Pet. 11, 19n.), to the effect that neither respondent between 1887 and 1940 ever presented their claims to the Department are without legal relevance, and, to the extent that they may have been thought to supply atmospheric background, misapprehend the legal atmosphere.

(1) Insofar as those remarks may be deemed to resuscitate the defense of laches, which was specifically rejected by the District Court (R. 210), it is doubtless sufficient to point out that that defense was abandoned on the second appeal, and is not presented here, even conditionally.

(2) The reason why no claim was presented is plain once the history of land grant litigation is looked to. The railroad could not force approval of selections of unsurveyed lands. *Northern Pacific Railway Co.* v. *Lane*, 46 App. D. C. 434, appeal dismissed

IV. The additional points raised simply underscore the insubstantiality of the Petition.

A. Petitioners assert (Pet. 12-13) that "it seems clear that rights 'to choose or select' lands not already appropriated to the carrier's claim were not 'lands', and that sales of such rights were not such sales of 'lands' as Congress excepted from releases under Section 321 (b)." This contention was rejected by both courts below (R. 207-208, 217-218), and necessarily so, since petitioners' view would render the statute nugatory.

Obviously, if the railroad already had legal title to the lands, there would be nothing on which the release could operate. The statute did not require patented lands to be released as a prerequisite to relief from land grant rates, nor did the railroad purport to release such lands (R. 58-59). The statute and the release both involved claims to land, *i. e.*, equitable titles. To the extent that the claims had not been transferred by the railroad, they were extinguished by the release. *Krug* v. *Santa Fe Pac. R. R. Co.*, 329 U. S. 591. To the extent that they had been sold to innocent purchasers for value, they survived. That was the plain, the obvious, and the only possible meaning of the statute.

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sub nom. Northern Pacific Railway Co. v. *Payne*, 254 U. S. 658. The rule that withdrawals which created deficiencies were void was established in a suit brought by—not against—the United States, which sought cancellation of a patent already issued. *United States* v. *Northern Pacific R. Co.*, 256 U. S. 51. And the rules governing the extent to which such withdrawals were illegal were laid down in the final *Northern Pacific* case, 311 U. S. 317, which was brought pursuant to specific Congressional direction. Act of June 25, 1929, c. 41, 46 Stat. 41. The circumstance that the lands here in question were specifically excepted from the release, by description, a release executed only two days after the decision in the final *Northern Pacific* case had finally settled the law, should be sufficient to establish that the claims now in litigation are not afterthoughts.

Since legal titles were involved only in patented lands, no longer owned by the Government, the terms of the Act could only refer to further claims to unpatented lands. The release of claims provided for in the Act therefore necessarily meant claims to unpatented lands, and the phrase "innocent purchaser for value" in consequence could only have referred to a purchaser of such claims, *i. e.*, of the equitable titles. The exception in the statute, and in the railroad's release, for innocent purchasers, would each have been meaningless otherwise. Because, once legal title had passed, the lands were patented lands, and excepted under another clause of both.

Petitioners' contention that the term "innocent purchaser for value" refers to an innocent purchaser of legal titles not only, as above indicated, ignores the terms of the statute, it ignores as well the implementing regulations promulgated by the Secretary to effectuate the release provisions. See Circular No. 1480, October 10, 1940, (6 F. R. 422).

Section 273.65(c) of those regulations (6 F. R. at 423), provided in pertinent part as follows:

> (c) The release must be accompanied by a list of the names of all innocent purchasers for value to whom the carrier has sold any of the unpatented or uncertified lands within the limits of its grant prior to September 18, 1940, if such sales have been made, together with the description of the lands so sold. * * *

The regulations under which the present applications were filed, likewise, contemplated throughout a valid transfer of rights to select indemnity lands. See R. 59-62.

Obviously, then, the Secretary of the Interior in his contemporaneous administrative construction of the Act did not consider that unpatented or uncertified lands could not be the subject of transfer. For, as this Court has held, "Every interest in lands is the subject of sale and transfer, unless prohibited by statute, and no words allowing it are necessary." *Smelting Co.* v. *Kemp*, 104 U. S. 636, 651; see

also *Beley* v. *Naphtaly*, 169 U. S. 353, 363. The fact that the right sold and transferred is a right to locate unidentified lands, as for instance bounty land warrants and scrip and selection rights, is not *per se* an impediment to the sale. *French* v. *Spencer*, 21 How. 228; *cf. West* v. *Lyders*, 36 F. 2d 108 (App. D. C.) (Valentine scrip). Clearly, as has been shown above, the railroad here had something to convey once it appeared that a deficiency in fact existed—and that something passed to Aztec.

B. Since petitioners only raise conditionally (Pet. 3, n. 1) the question whether Aztec was an "innocent purchaser for value" within the meaning of the Transportation Act of 1940, there is no occasion at this juncture to examine that problem now. But although the basic question is not ripe for discussion, the inconsistencies in petitioners' position on the issues involved under that heading throw, reflexly, a significant light on its merits.

In the original decisions in the Department, in 1943 and 1944, there can be found no trace of any suggestion that Aztec was anything but an innocent purchaser for value (R. 63-70, 81-84). At the first hearing in the District Court, the Secretary deposed that he had had no occasion to look into the question of Aztec's status. See R. 255-256. It was not until after the mandate of the Court of Appeals went down the first time, and a time had been set for answering the complaint herein (*supra*, p. 4), that the theory that Aztec was not an innocent purchaser for value was first formulated.

In the "administrative findings" which he prepared for the information of the Attorney General, the petitioner Chapman rested his conclusion that Aztec was not an innocent purchaser for value on the view that Aztec was under the "control" of Santa Fe (R. 193-199). He did not explain, however, nor did the authorities cited by him (R. 199), how "control", even if it existed, could militate against Aztec's status as an innocent purchaser of what it had bought, there being no defect in the equitable title

Santa Fe had sold. It was doubtless for this reason that counsel for the Secretary in the court below did not labor the "control" point, and did not repeat the Secretary's citations. (See Brief for Appellants, No. 10,303, U. S. Ct. of App. for the D. C. Circ., pp. 27-29.)

Contrariwise, counsel in the court below relied strongly on the view that Aztec's claim against Santa Fe had been merged in the arbitration award (R. 35, 132), see Brief for Appellants, No. 10,303, pp. 23-27, a point on which the Secretary's "administrative findings" had been completely silent. That silence, it is fair to assume, was based on two very sound reasons: First, by the very terms of the award, the claim for lands survived as a lien (R. 132). Second, by the specific terms of the Act incorporating the Santa Fe, the lien survived the 1896 foreclosure. See the last proviso of Section 1 of the Act of March 3, 1897, c. 374, 29 Stat. 622, 624.[8]

It would be difficult to conjure up a more inconsistent course of defense than that which petitioners have presented in this litigation. To say that the only consistency in their position has been inconsistency might smack of the facetious; but it would be entirely accurate to say that the only truly consistent thread in the pattern is that, whatever the Department's position at any given moment or at any particular posture of the case, it has always been adverse to respondents' claim. A defense so fluid, so fluctuating, and as persistently rejected by the courts as this one has been, does not, it is submitted, present a question of importance here.

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[8] Even apart from the statutory provision, Aztec's rights, obviously, could not have been cut off by a reorganization proceeding to which it was not a party. *Northern Pacific Ry. Co.* v. *Boyd*, 228 U. S. 482.

CONCLUSION.

The substantive questions involved in this case were correctly decided, and the question of reviewability raised in the petition does not arise on the facts. Moreover, this litigation is the last railroad land grant controversy which can possibly come before the courts, and thus is *sui generis*. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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MAY 1952.

APPENDIX.

Summary of the Evidence Sustaining the Concurrent Findings of the Courts Below That There was a Deficiency in the Grant.

Once the stipulated basic acreage figures (R. 204A) are examined, the correctness of the concurrent findings of the District Court (Fdg. 9, R. 40) and of the Court of Appeals (R. 218), that since some time prior to 1898 there has been a deficiency in the grant of not less than 100,000 acres, becomes apparent.

The area of the Atlantic & Pacific grant in place was found by the Secretary in 1931 to be 13,426,775.83 acres (R. 178). The losses in place (other than mineral) were 1,454,087.12 acres.[9]

The basic figure, therefore, with which it is necessary to start, is the constant figure of 1,454,087.12 acres, *i.e.*, the amount of the losses in place for which the grantee was entitled to make indemnity selections. Originally, as against the losses in place, there were 3,219,931.08 acres in the indemnity limits of the grant; these were the odd-numbered sections in the indemnity limits which were meant to be available for indemnity selections. However, there were two obstacles to their selection. The first was that they could not be selected as indemnity if already disposed of or even occupied by others. *Hewitt* v. *Schultz*, 180 U. S. 139; *Southern P. R. Co.* v. *Bell*, 183 U. S. 675. The second was that they could not be selected until they were surveyed. *Atlantic & P. R. Co.*, 17 L. D. 313; *Northern P. R. Co.*, 20 L. D. 187; *Cox* v. *Hart*, 260 U. S. 427, 436; *United States* v. *Northern Pacific R. Co.*, 311 U. S. 317, 342-345 (Point 7).

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[9] The exact amount of the losses in place was not known and could not have been known for many years as the administration and adjustment of the grant proceeded. The losses were finally determined by the Secretary of the Interior in 1931 in the amount stated in the text (R. 181).

Therefore, to determine whether there was a deficiency prior to August 17, 1898, whether it continued to 1940, and whether such deficiency was at any time less than 100,000 acres, the following questions must be answered:

1. How many acres of unsatisfied place losses were outstanding at the end of each year?

2. How many acres of vacant surveyed indemnity lands were available for selection at the end of each year?

The answers to these questions are found in the statement of stipulated basic acreage figures (R. 204A), which show:

First, the cumulative total, in acres, of approved indemnity selections at the end of each year.

(This permits a determination—by subtraction from the original and constant figure of 1,454,087.12 acres, which is the total amount of the losses in place as determined by the Department—of the unsatisfied place losses at the end of each year.)

Second, the vacant surveyed lands, in acres, at the end of each year, not withdrawn, and available for selection.

(This permits a determination—by comparison of these figures with the figures showing the unsatisfied losses at the end of each year—of the amount of the unsatisfied losses at the end of year for which no indemnity was then available, *i.e.*, the deficiency at the end of each year.)

To show these figures comparatively from 1897 (the year preceding the withdrawal here in question) to 1940, the chart following this Appendix has been prepared from the stipulated basic acreage figures prepared by the Bureau

of Land Management, under the following headings, which show, in acres, the figures at the end of each year, of—

(1) Cumulative total of approved indemnity selections.

(2) Outstanding unsatisfied losses.

(3) Vacant surveyed indemnity lands available for selection.

(4) Outstanding losses for which no indemnity was available.

For example, for the year 1897, this shows:

(1)	(2)	(3)	(4)
845,986.81	608,100.31	147,946.54	460,153.77

The figure in Column (1) is the cumulative total of approved indemnity selections at the end of 1897. The figure in Column (2) is the total of outstanding unsatisfied losses at the end of the same year, obtained by subtracting the figure in Column (1) from the total losses in place as determined by the Department. The figure in Column (3) is the vacant surveyed acreage, not withdrawn, available for selection at the end of 1897. The final figure, in Column (4), is the balance of the outstanding losses for which no indemnity was available at the end of 1897—which is to say, the deficiency in the grant at that time.

Similiar figures can be presented for the year 1924, the first year in which, according to the "administrative findings" made by the petitioner Chapman in response to a request by the Attorney General, no deficiency existed (R. 202-203).[10] The figures for that year are:

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[10] We have already pointed out, *supra*, p. 9, that in 1938, before the present litigation, the petitioner Chapman had referred to "the known insufficiency" of the indemnity lands in the Atlantic & Pacific grant as of 1934. *Santa Fe Pacific Railroad Company*, 56 I. D. 376, 379.

(1)	(2)	(3)	(4)
989,239.63	464,847.49	167,632.33	297,215.16

These figures show a deficiency at the end of 1924 amounting to 297,215.16 acres, being the difference between the outstanding unsatisfied losses, and the vacant surveyed acreage, not withdrawn, available for selection.

The error made by the Secretary in his "administrative findings" that there has been no deficiency in the grant since 1924 appears clearly from an analysis of the figures he used (R. 204A). Thus, in 1924, using the chart following this Appendix as a basis for comparison, it is apparent that the figures in Columns (1) and (2) were also used by the Secretary. However, to Column (3), which shows the total acreage of vacant surveyed lands available for selection at the end of 1924 as 167,632.33 acres, the Secretary added the amount of the withdrawn lands at that time to bring the total to 536,051.74 acres. Using that latter figure as the amount available for selection, he concluded that, at the end of 1924, there were 71,204.25 acres available for selection. That is to say, the only basis for the Secretary's "finding" that there has been no deficiency in the grant since 1924 is his own novel theory of land grant law to the effect that the rights of the grantee in 1898, when the lands now in question were first withdrawn, and the duties resting upon the grantee at that time, are to be determined in the light of hindsight. This theory, held erroneous by the District Court (R. 210) and by the Court of Appeals (R. 218), is, as has been pointed out above, pp. 9-11, condemned also by this Court's holdings in *United States* v. *Northern Pacific R. Co.*, 311 U. S. 317, 364-366 (Points 15, 16) and in *Santa Fe Pacific R. Co.* v. *Fall*, 259 U. S. 197, 199.

It follows that, since some time prior to August 17, 1898, the date of the withdrawal of the 98,000-odd acres here involved (Fdgs. 7-8, R. 40), there has been a deficiency in the grant of not less than 100,000 acres, in the sense of this Court's decisions in the two *Northern Pacific* cases (256 U. S. 51; 311 U. S. 317), and that the findings of both courts below to that effect (Fdg. 9, R. 40; R. 218) are clearly correct.

[See chart overleaf]

	(1) Cumulative total of approved indemnity selections, at end of each year, in acres	(2) Outstanding unsatisfied losses, at end of each year, in acres*	(3) Vacant surveyed indemnity lands, at end of each year, in acres	(4) Outstanding losses for which no indemnity available, at end of each year, in acres**
1897	845,986.81	608,100.31	147,946.54	460,153.77
1898	845,986.81	608,100.31	128,443.26	479,657.05
1899	845,986.81	608,100.31	128,344.4	479,755.91
1900	845,986.81	608,100.31	131,197.25	476,903.06
1901	845,986.81	608,100.31	119,984.67	488,115.64
1902	845,986.81	608,100.31	129,489.38	478,610.93
1903	845,986.81	608,100.31	151,500.15	456,600.16
1904	845,266.81	608,820.31	166,257.08	442,563.23
1905	845,266.81	608,820.31	161,629.46	447,190.85
1906	845,266.81	608,820.31	161,174.66	447,645.65
1907	845,266.81	608,820.31	82,420.08	526,400.23
1908	845,266.81	608,820.31	127,465.2	481,355.11
1909	845,266.81	608,820.31	123,819.6	485,000.71
1910	845,266.81	608,820.31	120,802.84	488,017.47
1911	842,224.21	611,862.91	142,967.07	468,895.84
1912	815,232.88	638,854.24	162,790.45	476,063.79
1913	815,752.88	638,334.24	161,671.48	476,662.76
1914	815,752.88	638,334.24	154,679.26	483,654.98
1915	902,715.15	551,371.97	74,452.36	476,919.61
1916	944,740.35	509,346.77	38,976.88	470,369.89
1917	953,838.09	500,249.03	27,677.93	472,571.1
1918	953,291.69	500,795.43	28,479.8	472,315.63
1919	953,131.69	500,955.43	53,543.37	447,412.06
1920	980,930.73	473,156.39	54,855.05	418,301.34
1921	989,495.72	464,591.4	22,859.73	441,731.67
1922	989,495.72	464,591.4	44,771.82	419,819.58
1923	989,239.63	464,847.49	44,948.8	419,898.69
1924	989,239.63	464,847.49	167,632.33	297,215.16
1925	989,239.63	464,847.49	195,985.12	268,862.37
1926	989,239.63	464,847.49	233,027.72	231,819.77
1927	1,001,090.	452,997.12	213,793.35	239,203.77
1928	1,015,090.08	438,997.04	202,588.24	236,408.8
1929	1,050,009.94	404,077.18	165,740.88	238,336.3
1930	1,051,925.4	402,161.72	164,465.42	237,696.3
1931	1,052,005.4	402,081.72	160,937.58	241,144.14
1932	1,068,896.92	385,190.20	165,484.84	219,705.36
1933	1,068,896.92	385,190.20	143,469.73	241,720.47
1934	1,068,896.92	385,190.20	143,156.02	242,034.18
1935	1,068,896.92	385 190.20	143,373.14	241,817.06
1936	1,068.896.92	385.190.20	149,076.98	236,113.22
1937	1,074,813.95	379.273.17	148,356.98	230,916.19
1938	1,074.813.95	379 273.17	148.836.98	230,436.19
1939	1,074,813.95	379 273.17	162,864.26	216,408.91
1940	1,074,813.95	379,273.17	177,892.83	201,380.34

* The figures in Column (2) are obtained by subtracting the cumulative total of approved indemnity selections at the end of each year, Column (1), from the total losses in place, 1,454,087.12 acres, as determined by the Department of the Interior.

** The figures in Column (4) are the difference at the end of each year between the outstanding unsatisfied losses shown in Column (2) and the vacant surveyed acreage *available for selection* shown in Column (3).